Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HIGHLAND FALLS-FORT MONTGOMERY CENTRAL SCHOOL DISTRICT, DOROTHY BAVARO, NANCY BROWN, MARGARET DISALVO, ROXANNE DONNERY, NEAL KREITZER, FRANK WISNIEWSKI, and MARY WHIFFEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether substantive legislation establishing Congressional policy priorities can be nullified by conflicting appropriations acts specifying only lesser dollar amounts irreconcilable with specific provisions of the substantive legislation without reference to the substantive statute, or its priorities.

2. Whether provisions of the federal education Impact Aid Act which require priority funding for schools serving handicapped children and schools in which federally acquired property reduces the school tax base by 10%, or more, when funds appropriated by Congress for all federal Impact Aid programs are not sufficient to pay all entitlements, but exceed the funds required by the priority programs, can be nullified by conflicting appropriations setting forth only bare dollar amounts below 100% for the priority programs

without reference to the authorizing statute or its priority mandate.

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REFERENCES TO OPINIONS IN THE CASE

The opinion of the Court of Appeals for the Federal Circuit is reported, 48 F.3d 1166, and set forth in the Appendix to this petition. A1. The decision of the Court of Federal Claims was delivered from the bench and is unreported. A12.

JURISDICTIONAL GROUNDS IN THIS COURT

The date of entry of the judgment sought to be reviewed is February 15, 1995. On May 8, 1995, the Chief Justice on petitioner's application, No. A-841, extended petitioner's time to file this petition to and including June 15, 1995. This Court's jurisdiction is invoked under 28 U.S.C. §2154(1).

STATUTES INVOLVED

Section 2 of the Impact Aid Act,[1] 20

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[1] Pub.L.No. 81-874, 64 Stat. 1100 (1950) (20 U.S.C. §§236-44)(1988 & Supp. V 1993) ("the Act"). The Impact Aid Act has been repealed and a new Impact Aid statute enacted. Improving America's Schools Act of 1994, Title VIII, §8001, 108 Stat. at 3749, codified at 20 U.S.C. §7701-7714

U.S.C. §237(a), as here applicable,

provides in part:

(a) Federal acquisition of property within school district as financial burden entitling for contribution

Where the Secretary, after consultation with any local educational agency . . . determines . . .

(1) that the United State owns Federal property in the school district of such local educational agency, and that such property... has been acquired by the United States since 1938... and... had an assessed value... aggregating 10 per centum or more of the assessed value of all real property in the school district... and

(2) that such acquisition has placed a substantial and continuing financial burden on such agency; and

(3) that such agency is not being substantially compensated for the loss in revenue resulting from such acquisition ... then the local educational agency shall be entitled to receive for such fiscal year such amount as, in the judgment of the Secretary, is equal to the continuing federal responsibility for the additional financial burden... placed on such agency by such acquisition of property.[2]

20 U.S.C. §240(c) of the Act provides

("the 1944 Act").

[2] The equivalent provision in the 1994 Act is Sec. 8002(a), 20 U.S.C. §7702. 108 Stat. at 3749-50.

in part:[3]

(c) Adjustments where necessitated by appropriations

If the sums appropriated for any fiscal year for making payments on the basis of entitlements established under sections 237, 238, and 239 of this title for that year are not sufficient to pay in full the total amounts which the Secretary estimates all local educational agencies are entitled to receive under such sections for such year, the Secretary shall allocate such sums among local educational agencies and make payments to such agencies as follows:

(1)(A) The Secretary shall first allocate to each local educational agency which is entitled to a payment under section 237 of this title an amount equal to 100 per centum of the amount to which it is entitled as computed under that section for such fiscal year . . .

STATEMENT OF THE CASE

The petitioner Highland Falls-Fort Montgomery Central School District has long been a recipient of federal impact aid funds paid to meet education needs created by federal land acquisition for which the federal government recognizes and has

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[3] This provision was changed in the 1994 Act Sec. 8002(b)(B), 108 Stat. at 3750, set forth at n. 3, A5.

assumed a direct responsibility.

The impact aid program was initiated in 1941, and has been carried forward on a continuing statutory basis since 1950, administered by the Department of Education (DOE). See, Highland Falls v. U.S., 48 F.2d 1166, 1167-68 (Fed.Cir. 1993), A2-3.

The financial hardship which impact aid addresses occurs in two basic ways: (1) by drastically impairing the ability of school districts to generate tax revenue for education by federal taking or ownership of real property and (2) by adding to the cost of education by increasing the number of students.

The Impact Aid Act as reauthorized in 1988, PL 100-297, 102 Stat. 130, carried forward the sharp distinction in earlier acts between these two kinds of federal harm. School districts deprived of funds by federal acquisition and ownership of property were covered in section 2 of the

Act, 20 U.S.C. §237(a), which called for federal contributions to be made to districts in which real property acquired by the federal government since 1938 exceeds 10 percent of the assessed value of all real property in the school district and as a result imposes an uncompensated loss of revenue which places a substantial and continuing financial burden on the district. Since such districts together with districts serving handicapped children are accorded priority in funding under §240(c), discussed below, the §237(a) districts are hereinafter sometimes referred to as "priority districts." The Secretary of DOE determines whether a district is a priority district meeting the requirements under §237(a).

School districts burdened by increases in attendance by school children are covered by section 3, 20 U.S.C. §238, in the case of children residing on, or whose

parents are employed on, federal property and by section 4, 20 U.S.C. §239, children of persons who reside or work on federal property.

The financially deprived districts entitled to assistance under §237(a) are vastly outnumbered by financially burdened districts entitled to aid under §§238 and 239 both in terms of the number of districts affected and the amount of financial assistance needed.

The United States Military Academy at West Point is located in the Highland Falls school district. As a result of property acquired for the Academy since 1938 (more than half of the real property in the district) Highland Falls has clearly been deprived of significant tax revenue and is a priority district eligible to receive impact aid under §237(a).

For the fiscal years 1989-93, the reauthorization statute enacted in 1988,

authorized the following amounts to be appropriated for the impact aid program, 20 U.S.C. §236(b):

1989 $735,000,000

1990 $785,000,000

1991 $835,000,000

1992 $885,000,000

1993 $935,000,000.

The statute further provided in §240(c) that if the sums appropriated for any fiscal year for making payments on the basis of entitlements established under §§237, 238 and 239 are not sufficient to pay in full the total amounts of entitlements under these sections for the year the Secretary:

> ... shall first allocate to each local educational agency which is entitled to a payment under section 237 of this title an amount equal to 100 per centum of the amount to which it is entitled...

The Senate Report for the reauthorization statute, quoted infra at p. 17, enacted in 1988 explained the

purposes of the impact aid program and the need for a distribution formula if appropriations were not sufficient to pay full entitlement, expressly stressing "the intent of the Committee to provide a thorough method for the distribution of funds for times when Impact Aid is funded below entitlement." §240(c) spells out this intent for districts under §238, in addition to the priority it gives §237 districts.

This legislative history, as well as the painstaking detail in §240(c) itself, demonstrates that Congress had specifically provided the solution for situations, specifically addressed in this case, that would arise when later enacted appropriation measures would fail to fund the impact aid program at full entitlement.

The fundamental policy decision to fund deprived schools under §237(a) at 100% of entitlement, if total appropriations

were not sufficient to pay in full the total amounts of all entitlements under §§237, 238 and 239 and were not provided at 100% in the appropriations bills that followed, was clearly stated in the authorizing act.

Each year from 1989-93 the amounts appropriated were less than full entitlement and in each year DOE paid less than 100% of the priority districts' entitlement to them despite the mandate of §240(c). In each year, the appropriations bills specified amounts to be paid to §237 districts that were less than 100% entitlement and DOE paid the lesser amounts. Although the appropriations bills did not repudiate or modify, or even mention, the 100% entitlement to which §237 districts were entitled under §240(c) in actuality §240(c) was effectively repealed. In the hurly-burly of the appropriations process the fundamental policy of giving

priority to deprived districts was lost in favor of the more numerous and politically influential districts burdened by increases in students.

For example, for fiscal year 1989, the appropriations bill provided a total of $717,000,000 for districts under §§237 and 238 of which $15,000,000 was listed for entitlements under §237 and $702,000,000 for entitlements under §238. Total entitlements for the year determined by DOE exceeded the $717 million appropriated for all impact aid programs. Entitlements for §237 districts as determined by DOE exceeded $15,000,000. Rather than follow the allocation formula under §240(c) entitling §237 districts to funding at 100% of their entitlement, DOE distributed to §237 districts the lesser amount set forth in the appropriation bills.

In each year thereafter through 1993, an appropriations bill similarly provided

for less than sufficient funding to pay the full amount of impact aid entitlements for all recipients and stated amounts for payment under §237 that were less than 100% of the amounts of their entitlement as determined by DOE. In some instances the legislative history of the appropriations bill stated that individual payments would be rateably reduced from full entitlement to the appropriated level. See e.g. the Senate Report No. 397, 102d Cong., 2d Sess. 196 (1992) for the FY 1993 appropriation, Pub.L. 102-394, 106 Stat. 1792, 1813-14 (1992).

In each year, DOE made payments to §237 districts of the amounts set forth in the appropriations bill rather than adhere to the 100% entitlement formula under §240(c). The total amount of the resulting underpayment to Highland Falls of §237 funds for the fiscal years 1989-93 as claimed by the district was $1,998,187.19.

In March 1993 Highland Falls and the seven members of its Board, who were also parents of school children and residents and taxpayers in the district, filed a complaint in the U.S. Court of Federal Claims to recover this amount of unpaid funds. The Court's jurisdiction was invoked under 28 U.S.C. §1491. The government moved before answer to dismiss the complaint, seeking the dismissal of the claim for monetary damages under CFC Rule 12(b)(4) for failure to state a claim upon which relief can be granted.

The motion came to be heard before the Hon. Moody R. Tidwell, III, Judge, on January 13, 1994. After hearing argument of counsel the Court in a bench ruling, A12, granted the government's motion. It ruled that the Highland Falls entitlement to funds under the Act was not mandatory, that the later enacted appropriations acts reducing appropriations to a set sum

superseded the provision in the authorization statute for 100% payment of entitlement, and held, inter alia that petitioners failed to state a monetary claim for which relief can be granted.

Petitioners took an appeal to determine whether the CFC's dismissal of the claim for unpaid impact aid funds under §237 was correct as a matter of law. Petitioners argued the dismissal incorrectly applied an appropriations law to nullify §240(c) of the authorization statute which on the undisputed facts of this case expressly provided for distribution of 100% of their entitlement to §237 school districts, relying heavily on TVA v. Hill, 437 U.S. 153 (1978).

On February 15, 1995, the Court of Appeals affirmed, 48 F.3d 1166, A1. It ruled that the amounts appropriated each year were a sufficient indication of Congressional intent to justify

distribution by DOE of §237 funds without regard to the allocation formulas in §240(c) and that even if §240(c) were applied by DOE in accordance with its terms, this would have been insufficient authorization for the full 100% entitlement to be distributed because of limitations affecting appropriations contained in two additional statutory provisions, 31 U.S.C. §1341(a)(1)(A) and 31 U.S.C. §1532, see A9-11. The Court made no reference to TVA v. Hill.

This petition follows.

REASONS FOR GRANTING THE WRIT

This case is an extreme example of a conflict between a substantive statute establishing Congressional programs, policies and priorities and subsequent appropriations for its programs which specify only dollar amounts and do not address the inherent conflict thereby created with that authorizing legislation.

The proper operation of the Impact Aid program is particularly a federal matter, justifying review, because it embodies Congressional recognition that the federal government has caused financial harm to school districts which it has a direct responsibility to rectify. Recognizing the great hardship that permanent federal acquisition of significant lands comprising the tax base for public school districts impose on education, students, their families and the communities affected, Congress authorized in the Federal Impact Aid Act that where such lands constitute 10% or more of the tax base, "the Secretary shall allocate" 100% of the amounts due to such districts from the appropriations even when the total appropriations are insufficient to pay the full amounts of all Impact Aid programs, necessarily diminishing thereby the much larger funds available to other Impact Aid recipients.

20 U.S.C. §240 (c)(1)(A). More than half the real property in petitioner Highland Falls School District is owned by the United States and part of the U.S. Military Academy.

Without alluding in any way to the clear Congressional language in the Impact Aid Act requiring an allocation of 100% of the funds due to priority districts the appropriations for 1989-1993 earmarked amounts less than 100% of the funds due such districts.

The Secretary "earmarked" appropriations for such priority districts, effectively nullifying the substantive legislation, without a word of direction from the Congress as to how he should resolve the conflict.

The Congress had spoken directly without ambiguity to the precise question at issue in this case in the Impact Aid Act when it expressly directed a priority

payment of 100% of amounts due such districts. The legislative history explains with perfect clarity the intent of Congress:

> The sharp decline in available funds during this decade has left a huge gap between the entitlement and appropriations, with the present program being funded at approximately 50 percent of entitlement.
>
> * * *
>
> The Committee believes that it is necessary to include a formula for distribution of Impact Aid funds directly in language authorizing the program.
>
> * * *
>
> It is the intent of the Committee to provide a thorough method for the distribution of funds for times when Impact Aid is funded below entitlement.
>
> * * *
>
> The payment system is intended to guarantee that all districts share in overall losses and gains in the Impact Aid program, while at the same time setting a clear priority for those districts that are most heavily impacted.
>
> * * *
>
> When making payments, the Secretary must first pay to each local educational agency serving handicapped children full entitlement for such children, as well as 100 percent of the entitlement for Section 2 districts.

From the Senate Report for the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. 100-297, 102 Stat. 130 (1988), S.Rep. No. 222, 100th Cong., 2d. Sess. 101, 150, 153-154, (1988).

In sharp contrast to the authorizing legislation, the conflicting appropriations for 1989-1993 earmarked dollar amounts for such priority entitlements e.g. $15,000,000 for FY 1989 out of a combined total under the Act of $717,000,000, that were substantially below 100% of the funds due without referring to §240(c), or any language to repeal its effect. H.R. App. 23-25 (Pub.L. 100-436, at 22, 102 Stat. 1680, 1701 (1988).

The Secretary was affirmed by the Court below in allocating funds on the basis of the later enacted appropriations. The effect is the de facto repeal of the substantive provision of the Federal Impact Aid Act and the priorities it legislated, solely because of a single ledger entry in an appropriations bill. The effect is to deny school districts with large acquired federal land holdings compensation for their lost tax base. The importance of

school tax bases and school expenditures to the quality of education provided in the public schools of the United States has long been recognized by this Court and where prohibited discriminations are involved have been held to violate the Constitution. See, San Antonio School District v. Rodriguez, 411 U.S. 1 (1973); Milliken v. Bradley, 433 U.S. 267 (1977); Missouri v. Jenkins, No. 93-1823, decided June 12, 1995.

The decision below would support the resolution of conflicts between substantive statutes establishing clear Congressional policies and priorities and subsequent appropriations expressed entirely in dollar amounts in favor of the later enacted appropriations act wiping out Congressional policies and priorities established in authorizing acts, creating chronic uncertainty as to the Congressional intent and risking chaos in statutory

interpretation.

Unless this Court enforces the rule that Congress can only repeal a prior substantive act through passage of appropriations legislation by language which explicitly expresses its intention to do so, the tensions, uncertainties and outright conflicts, as here, between authorizing legislation and appropriations will undermine Congressional intent and continue to generate unnecessary and harmful litigation. Substantive legislation should be afforded the same protection under the Supremacy Clause from casual, unclear, or capricious repeal by bare appropriations acts that have long protected treaties from legislative infringement. See Murray v. The Charming Betsy, 2 Cranch 64, 117-118 (1804)("an act of Congress ought never be construed to violate the law of nations if any other possible construction remains.")

The decision below is in direct conflict with TVA v. Hill, 437 U.S. 153 (1978) a leading precedent with respect to the effect to be given appropriation statutes in assessing the Congressional intent to repeal or modify policies expressed in underlying authorization statutes. Hill is a precedent of continuing importance not only in the environmental area, see Forest Conservative Council v. Rosboro Lumber Co., 50 F.3d 781, 785, 787 (9th Cir. 1995), but in a wide variety of other contexts as well, see e.g. Bobo v. U.S. Dep't. of Agriculture, ___ F.3d ___, 1995, slip op. at 18-19, WL 258715, Electronic citation: 1995 FED App. 0138P (6th Cir. May 5, 1995)(No. 94-3014)(rejecting an appropriations law as an adequate basis for implying a change in Congressional intent with respect to the permissibility of utilizing digital palpitation to measure whether a horse is

"sore" within the meaning of a prohibition in the Horse Protection Act against showing and exhibition of "sore" horses). The failure of the court below to give any consideration whatsoever to TVA v. Hill, creates an independent need for review of the decision.

The conflict in Hill between the policy expressed in the basic underlying statute to conserve endangered species, in that case the snail darter threatened by construction of the Tellico dam, and the seemingly inconsistent acts of Congress in continuing to appropriate money to complete construction with knowledge of the controversy over the fate of the snail darter is equivalent to the conflict in the present case. There the appropriations threatened the snail darter while here it threatens Congressional aid to the handicapped and impacted area school children.

That this Court required adherence in Hill to the Congressional intent expressed in the authorization statute requires that effect here be given §240(c). The appropriation bills here provide much less compelling a basis for any inference that Congress intended to override §240(c), because §240(c) expressly provides for the allocation of 100% entitlement from the other Impact Aid appropriations.

If proper effect is given to §240(c), which the Court below failed to do, the allocation formula constitutes clear transfer authority and direction for the Secretary to have allocated the $717,000,000 appropriated for 1989 and the sums thereafter appropriated through 1993, to make full payment to priority districts of the 100% entitlement the allocation formula requires them to receive, and restrictions contained in statutes such as 31 U.S.C. §1341(a)(1)(A) and §1532,

discussed by the Court below, 48 F.3d at 1171-72, A9-11, are not implicated. The contrary ruling of the Court below is unsupported by any citation of authority, id. at 1172, A11.

There is no basis for inference here that Congress wanted to override the clearly provided allocation formula contained in the authorization statute. In enacting the appropriations statutes, Congressional language revealed no intention to repeal §240(c) or any awareness of its formula which entitled priority districts to 100% funding.

Had Congress wanted to override §240(c) or repudiate its policy it would have been a simple enough matter to so state, i.e to state that the payment was to be made notwithstanding the provisions of §240(c), as the statute interpreted to intend a policy departure explicitly did in Republic Airlines, Inc. v. U.S. Dep't. of

Transportation, 849 F.2d 1315, 1320 (10th Cir. 1988).

In refusing in Hill to infer from an appropriations law the repeal or amendment by implication of the policy in the authorization statute this Court stated, 437 U.S. at 189:

> "There is nothing in the appropriations measures, as passed, which states that the Tellico Project was to be completed irrespective of the requirements of the Endangered Species Act. These appropriations, in fact, represented relatively minor components of the lump-sum amounts for the entire TVA budget. To find a repeal of the Endangered Species Act under these circumstances would surely do violence to the "'cardinal rule ... that repeals by implication are not favored.'" (Emphasis in the original)(footnote omitted)(citation omitted).

This case calls as did Hill for application of the doctrine disfavoring repeals by implication especially when the subsequent legislation is an appropriation measure. id. at 190. Legislation by appropriation is contrary to the House and Senate rules, id. Although the Appropriations Committee in Hill was aware

of and agreed with TVA's views there was no indication that Congress as a whole was aware of TVA's position. This is also true in the present case.

Here, as in Hill, there is an irreconcilable conflict between the 100% entitlement that §240(c) requires for priority districts deprived of tax revenues by the federal government and the lesser amounts that Congress thereafter specified in lump sum appropriations for these districts.

The Court below sought to avoid this conflict by accepting the government's argument that §240(c) did not mean what it said -- that it applied only in years when the lump sum appropriation made for all impact aid programs did not itemize amounts.

The Court below held, despite the clear language of §240(c), that "DOE's approach gave effect to both the provisions

of the act and the appropriations laws." It reasoned that DOE gave effect by applying §240(c) when "an appropriations law provided a lump sum appropriation not specifically earmarked for various sections of the Act." This metaphysical, off-again on-again interpretation is contrary to the clear language of §240(c) which makes no reference to lump sum, or earmarked appropriations and ignores the principles of Hill which preclude such an approach. See e.g. 437 U.S. at 194:

> Congress has spoken in the plainest of words, making it abundantly clear that the balance struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which is described as "institutional caution."
>
> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.....

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 15, 1995

APPENDIX

United States Court of Appeals for the Federal Circuit

94-5087

HIGHLAND FALLS-FORT MONTGOMERY CENTRAL SCHOOL DISTRICT, DOROTHY BAVARO, NANCY BROWN, MARGARET DISALVO, ROXANNE DONNERY, NEAL KREITZER, FRANK WISNIEWSKI, and MARY WHIFFEN,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

Michael C. Eidens, Eidens & Dickson, of Schenectady, New York, argued for plaintiffs-appellants. Also on the brief was *Forrest B. Fordham, III*, of Butler, Pennsylvania, of counsel.

Joan Mary Bernott, Special Litigation Counsel, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellee. With her on the brief were *Frank W. Hunger*, Assistant Attorney General and *David M. Cohen*, Director. Also on the brief was *Miriam Haverstock Whitney*, Office of the General Counsel, U.S. Department of Education, Washington, D.C., of counsel.

Appealed from: U.S. Court of Federal Claims

Judge Tidwell, III

DECIDED: February 15, 1995

Before RADER, *Circuit Judge*, SMITH, *Senior Circuit Judge*, and SCHALL, *Circuit Judge*.

SCHALL, *Circuit Judge*.

Appellants are the Highland Falls-Fort Montgomery Central School District in the State of New York (Highland Falls) and seven individuals who are members of the Highland Falls Board of Education, residents of the school district, and payers of real property taxes. They appeal the January 14, 1994 judgment of the United States Court of Federal Claims dismissing their complaint pursuant to Court of Federal Claims Rule 12(b)(4) for failure to state a claim upon which relief could be granted. Appellants sought the payment of money which they alleged Highland Falls should have received from the government in fiscal years 1989 through 1993 pursuant to Section 2 of the Impact Aid Act, Pub. L. No. 81-874, 64 Stat. 1100 (1950) (20 U.S.C. §§ 236-244 (1988 & Supp. V 1993) (the Act)).[1] The court dismissed the complaint after concluding that Highland Falls's entitlement to funds under the Act was not mandatory and that appellants therefore did not have a monetary claim against the government. We affirm.

BACKGROUND

1. *The Impact Aid Act*

Congress passed the Act in 1950. In so doing, it continued the program, initiated in 1941, of authorizing the expenditure of federal funds to assist local educational agencies or school districts affected by the federal government's extensive mobilization and production activities in World War II. The impact of federal activities on local school districts did not cease when the war ended, however, and Congress chose to

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[1] Section 2 of the Act, 64 Stat. 1100, 1101, is codified at 20 U.S.C. § 237 (1988 and Supp. V 1993). Citations to provisions of the Act are to the provisions as codified in the 1988 United States Code, which was in effect at the time of the events underlying appellants' complaint. The Impact Aid Act has been repealed, *see* the Improving America's Schools Act of 1994, § 331(b), Pub. L. No. 103-382, 108 Stat. 3518, 3965, and a new Impact Aid statute enacted, *see id.* at Title VIII, § 8001, 108 Stat. at 3749, codified at 20 U.S.C. §§ 7701-7714 (1994). For ease of reference we refer to the provisions of the repealed Act at issue here in the present tense.

authorize funds on a continuing, statutory basis. The Act is administered by the Department of Education (DOE).

The Act provides for assistance to school districts that are financially burdened by federal ownership of real property. Federal ownership of real property within a school district can financially burden the district by reducing the district's tax base or by increasing student population in the district as a result of federal activities. Section 2 of the Act is entitled "Federal contributions." It addresses financial burdens caused by federal ownership of real property within a school district and is central to this appeal. It provides, in relevant part, as follows:

> **(a) Federal acquisition of property within school district as financial burden entitling for contribution**
>
> Where the Secretary, after consultation with any local agency . . . determines . . .
>
> > (1) that the United States owns Federal property in the school district of such local educational agency, and that such property . . . has been acquired by the United States since 1938 . . . and . . . had an assessed value . . . aggregating 10 per centum or more of the assessed value of all real property in the school district . . . and
> >
> > (2) that such acquisition has placed a substantial and continuing financial burden on such agency; and
> >
> > (3) that such agency is not being substantially compensated for the loss in revenue resulting from such acquisition . . .
>
> then the local educational agency shall be entitled to receive for such fiscal year such amount as, in the judgment of the Secretary, is equal to the [financial burden imposed].

20 U.S.C. § 237(a).[2] Thus, once the requirements of the statute have been met, the Secretary of DOE determines a school district's entitlement to funds under § 237. Other sections of the Act provide for entitlements for school districts that educate children of persons who reside and work on federal property, *see* 20 U.S.C. § 238, or that incur a sudden and substantial increase in attendance by school children, *see* 20 U.S.C. § 239.

The statute recognizes that Congress may choose to appropriate less money for entitlements under the Act than is required to fund those entitlements fully. That situation is addressed in the following manner:

> **(c) Adjustments where necessitated by appropriations**
>
> If the sums appropriated for any fiscal year for making payments on the basis of entitlements established under sections 237, 238, and 239 of this title for that year are not sufficient to pay in full the total amounts which the Secretary estimates all local educational agencies are entitled to receive under such sections for such year, the Secretary shall allocate such sums among local educational agencies and make payments to such agencies as follows:
>
> (1)(A) The Secretary shall first allocate to each local educational agency which is entitled to a payment under section 237 of this title an amount equal to 100 percentum of the amount to which it is entitled as computed under that section for such fiscal year . . .

20 U.S.C. § 240(c). Thus, § 240(c) specifies that § 237 shall be funded at 100% of entitlements in those fiscal years in

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[2] The equivalent provision in the 1994 Act is Section 8002(a), codified at 20 U.S.C. § 7702. 108 Stat. at 3749-50.

which the total amount appropriated by Congress is insufficient to fund all entitlements under the Act.[3]

2. *Facts of the Case*

In the annual appropriations laws for fiscal years 1989 through 1993, Congress did not appropriate enough money to fully fund entitlements under the Act. In those years, instead of appropriating a lump-sum amount for all entitlements under the Act, Congress specifically allocated or "earmarked" certain amounts for entitlements under various sections of the Act, including § 237 entitlements. For example, in fiscal year 1989, Congress appropriated a total of $717 million for entitlements under the Act, $15 million of which was earmarked for § 237 entitlements. *See* Pub. L. No. 100-436, 102 Stat. 1680, 1701 (1988). The remainder of the appropriated funds was earmarked for entitlements under other sections of the Act.

During fiscal years 1989 through 1993, in the face of congressional underfunding, DOE allocated funds for entitlements under the various sections of the Act based upon the amounts earmarked for those sections by Congress in the respective appropriations laws. In 1989, for example, DOE funded entitlements under § 237 to the extent of the $15 million earmarked for that section by Congress, which was less than the total entitlements under that section as determined by the Secretary of DOE. Thus, in the years at issue, DOE followed Congress's specific funding directives instead of applying the allocation formula set forth in § 240(c).

Since 1971, Highland Falls has annually sought and received federal funds under the Act, to compensate for the unavailability of real property tax revenue that certain real

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[3] This provision was changed in the 1994 Act. Section 8002(b)(B) of the 1994 Act provides that "[I]f funds appropriated under Section 8014(a) are insufficient to pay the amount determined [to be paid to local educational agencies], the Secretary shall ratably reduce the payment to each eligible local educational agency." 108 Stat. at 3750.

property in the school district would have produced if that property had not been owned by the federal government. The property in question is occupied by the United States Military Academy at West Point and represents more than one-half of the real property within the school district. Highland Falls qualified to receive funds under § 237 in fiscal years 1989 through 1993. In each of those years, however, as a result of the congressional underfunding described above and DOE's policy of not applying the allocation formula in § 240(c), the money Highland Falls received under the Act was less than its § 237 entitlement, as determined by the Secretary of DOE.

3. *Proceedings Below*

On March 15, 1993, appellants filed suit in the Court of Federal Claims, challenging the legality of DOE's allocation of funds under the Act. In their complaint, appellants alleged that during fiscal years 1989 through 1993, when congressional appropriations were insufficient to fund all entitlements under the Act, DOE had improperly failed to fund § 237 at 100% of entitlements, as required under the allocation formula provided in § 240(c). Appellants asserted that, as a result of DOE's failure to implement § 240(c) properly, Highland Falls had received a total of $1,998,187.19 less during those five fiscal years than it would have received had § 240(c) been interpreted and applied as they suggest.

The government moved to dismiss the complaint under Court of Federal Claims Rule 12(b)(4) for failure to state a claim upon which relief could be granted. In support of its motion, the government argued that DOE's approach of allocating funds under the Act based upon congressional appropriations was correct. In a bench ruling on January 13, 1994, the court concluded that the Impact Aid program is not a mandatory spending program and that, even if it were, the later appropriations laws superseded the § 240(c) priority allocation provisions upon which appellants' complaint was based. Accordingly, the court held that Highland Falls did not have a monetary claim against the government and ordered that the complaint be dismissed. This appeal followed.

DISCUSSION

1. *Standard of Review*

A motion to dismiss for failure to state a claim upon which relief could be granted is appropriate where the plaintiff cannot assert a set of facts which would support its claim. *Chang v. United States*, 859 F.2d 893, 894 (Fed. Cir. 1988). In reviewing the grant of a motion to dismiss under Rule 12(b)(4), we assume that all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). The question of whether a complaint was properly dismissed for failure to state a claim upon which relief could be granted is one of law, which we review independently. *Id.* at 1273.

2. *Contentions of the Parties*

The facts are not in dispute. Rather, appellants contend that the Court of Federal Claims erred as a matter of law in holding that the earmarked funding provisions of the later-enacted appropriations laws took precedence over the priority allocation provisions of § 240(c). More specifically, appellants argue that § 240(c) applies to both lump-sum appropriations and earmarked appropriations. According to appellants, in the face of appropriations insufficient to fully fund entitlements under § 237, DOE should have applied the formula of § 240(c) and transferred funds from other programs under the Act in order to fully fund § 237 entitlements.

The government argues that § 240(c) requires that DOE fund § 237 at 100% of entitlements only in years in which Congress enacts a lump-sum appropriation, rather than earmarked appropriations, for "making payments on the basis of entitlements established under Sections 237, 238, and 239 . . . ." 20 U.S.C. § 240(c). The government contends that when the total appropriation is less than the total entitlements, and Congress specifically earmarks certain funds for programs under each section of the Act, § 240(c) does not apply. Thus, according to the government, DOE correctly interpreted

the statute when, in each of the relevant fiscal years, it allocated funds for § 237 entitlements only to the extent of the amounts earmarked by Congress in the corresponding appropriations laws. In the government's view, DOE's approach was correct because it gave effect to all provisions of the Act and to the later appropriations laws.

3. *Analysis*

Congress has charged the Secretary of DOE with the responsibility of administering the program established by the Act. In that regard, the supreme Court has stated:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (footnotes omitted). Thus, the first step in our analysis is to determine whether, as a matter of law, Congress has "directly spoken to the precise question at issue," so that we "must give effect to the unambiguously expressed intent of Congress." *Id.*

The "precise question at issue" in this case is whether, in the face of underfunding by Congress, DOE erred in allocating funds for § 237 entitlements based upon the amounts

earmarked for that section in the respective appropriations laws, instead of funding § 237 entitlements at 100% in accordance with § 240(c). We conclude that Congress "has directly spoken" to this question and that DOE, in following the approach it did, "g[a]ve effect to the unambiguously expressed intent of Congress." *Id.*

First, and most importantly, we have great difficulty imagining a more direct statement of congressional intent than the instructions in the appropriations statutes at issue here. For example, the appropriations statute for fiscal year 1989 stated: "$15,000,000 shall be for entitlements under section 2 [§ 237] of said Act." Pub. L. No. 100-436, 102 Stat. 1680, 1701 (1988).[4] In each of the relevant fiscal years DOE followed that mandate. Section 240(c) specifies that § 237 shall be funded at 100% of entitlements in those fiscal years in which the total amount appropriated by Congress is insufficient to fund all entitlements under the Act. DOE did not apply that requirement, however, in the face of congressional underfunding of entitlements under the Act through earmarked appropriations rather than through lump-sum amounts. As we now explain, DOE's approach was consistent with statutory requirements.

Up to this point our analysis has focused upon 20 U.S.C. §§ 237 and 240(c). Two additional statutory provisions — 31 U.S.C. § 1341(a)(1)(A) (1988 & Supp. V 1993) and 31 U.S.C. § 1532 (1988) — also bear upon the question of whether DOE was confronted with a clear congressional mandate and whether it acted in a way that was consistent with that

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[4] The appropriations laws for fiscal years 1990 through 1993 used substantially identical language, except for the dollar amount appropriated. *See* Pub. L. No. 101-166, 103 Stat. 1159, 1180 (1989) ("$15,534,000 shall be for payments under section 2 of said Act"); Pub. L. No. 101-517, 104 Stat. 2190, 2210 (1990) ("17,000,000 shall be for Federal property payments under section 2"); Pub. L. No. 102-170, 105 Stat. 1107, 1128 (1991) ("$16,590,000 shall be for Federal property payments under section 2"); Pub. L. No. 102-394, 106 Stat. 1792, 1813 (1992) ("16,424,000 shall be for payments under section 2").

mandate. Section 1341(a)(1)(A) states that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation . . . for the expenditure." Section 1532 states that "[a]n amount available under law may be withdrawn from one appropriation account and credited to another . . . only when authorized by law." These two statutes are relevant because they speak directly to the "precise question at issue." Section 1341(a)(1)(A) makes it clear that an agency may not spend more money for a program than has been appropriated for that program, while § 1532 provides that an agency may use money appropriated for one program to fund another program only when authorized to do so by law. It is undisputed that, in each of the relevant fiscal years, Congress appropriated specific amounts to pay for § 237 entitlements. It also is undisputed that, in each of the relevant fiscal years, in order to fund § 237 entitlements at 100% levels, it would have been necessary for DOE to use money appropriated by Congress for entitlements under other sections of the Act — squarely in contravention of § 1532. The approach DOE followed was consistent with this statutory landscape.

"When two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). DOE's approach gave effect to both the provisions of the Act and the appropriations laws. DOE's approach gave effect to § 240(c) by applying that provision when an appropriations law provided a lump-sum appropriation not specifically earmarked for various sections of the Act. DOE's approach also gave effect to the funding decisions of Congress, which earmarked specific amounts for § 237 entitlements.

DOE's approach also harmonized the requirements of the Act and the appropriations statutes with the requirements of 31 U.S.C. §§ 1341(a)(1)(A) and 1532. Specifically, DOE's approach did not require that funds appropriated for one section of the Act be redirected to fund § 237 at 100% of entitlements; it thus avoided conflict with §§ 1341(a)(1)(A) and

1532. As noted above, in order for DOE to fund § 237 entitlements at 100% in accordance with § 240(c), the agency would have had to transfer money from other sections' appropriations to fund §237. If DOE had followed such an approach, it would have been spending more money than Congress had appropriated for § 237 entitlements, in violation of § 1341(a)(1)(A). In addition, it would have been depriving at least one other section's program of funds expressly appropriated for it by Congress. Put another way, it would have been "raiding" one appropriation account, for example § 238 or § 239, to credit another, § 237, in violation of § 1532.

Finally, appellants contend that "in the present case, 20 U.S.C. § 240(c) can be construed as a statute conferring transfer authority on the Department of Education," thereby enabling DOE to fund section 237 at 100% of entitlements. We disagree. The language necessary to support such a conclusion is lacking from the statute. Section 1532 provides that "[a]n amount available under law may be withdrawn from one appropriation account and credited to another . . . only when authorized by law." In view of the language of the appropriations laws at issue here and the prohibition of § 1341(a)(1)(A) against an agency spending more money for a program than has been appropriated for that program, we are not prepared to accept the proposition that the transfer of funds for which appellants argue was "authorized by law."

CONCLUSION

For the foregoing reasons, we hold that Congress "has directly spoken," *Chevron*, 467 U.S. at 842, to the question of whether DOE erred in allocating funds for § 237 entitlements based upon the amounts earmarked for that section in the respective appropriations laws instead of funding § 237 entitlements at 100% in accordance with § 240(c). We also hold that, in following the approach it did, DOE "g[a]ve effect to the unambiguously expressed intent of Congress." *Id.* at 843. Accordingly, the judgment of the Court of Federal Claims dismissing appellants' complaint for failure to state a claim upon which relief could be granted is

AFFIRMED.

UNITED STATES
COURT OF FEDERAL CLAIMS

HIGHLAND FALLS FORT MONTGOMERY CENTRAL SCHOOL DISTRICT,	)	
Plaintiff,	)	No. 93-150C
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

Bench Ruling by Judge Moody R. Tidwell, III

No. 93-150C January 13, 1994

THE COURT: I'll take no questions on it, and I reserve the right to issue a written order if I find it necessary later.

I want to start with the proposition that this Court's jurisdiction is based on the existence of a waiver of Sovereign Immunity. That's the Tucker Act in the presence of a Money Mandating Act. That's a law, regulation contract provision of the constitution. I find, in general, that it's congressional intent that neither the Impact Aid Act, nor the implementing regulations guarantee a school district receipt of funding. The facts are known, and I don't need to discuss them. I do want to make it clear, though, that this opinion is limited to the particulars of this case. Now what I mean by that is basically the language in the Appropriation Act for this year. Other language, or a different form of appropriation could mean a difference in the outcome. I'm not saying it does, but it might, but that's not before me. I'll discuss the five issues briefly.

The first one is whether the Impact Aid Program is mandatory, and if so, whether later enacted reduced appropriations

supersede that program. I find that it's not mandatory, but even if it was, it was superseded by the Appropriation Act. By appropriating a set sum for Section 2, Congress limited the amount of money that could be spent in the current year under Section 2. If it had been a lump sum appropriation, the answer might have been different. I'd point out that it is a federal crime for any federal government officer to knowingly spend money in excess of that appropriated by Congress. It's also against the law to augment appropriations, such as taking from one fund in an agency and putting it into a different fund within that agency.

Issue two, whether a claim for breach of implied in fact contract exists or was pled. I find it was not. A complaint of breach of implied in fact contract has to plead mutuality of intent offer and acceptance of actual authority. None of these elements were pled, and they really don't exist. Plaintiff's mere expectation of continued receipt of federal benefits does not rise to the level of contract right to receive the expected amount. Specifically in response to what you said, Mr. Eidens, I find that that not to be the case, that an application for money and acceptance by the government constitutes an offer and an acceptance, such as would give rise to an implied in fact contract.

The third issue is equitable estoppel. It is, in effect, promissory estoppel, which is not within this Court's jurisdiction. Promissory estoppel is a doctrine for enforcing promises to induce action or inaction. It's used to frame a cause of action, whereas equitable estoppel functions to bar raising of a defense.

Issue four, deprivation of due process and equal protection. Neither one of those clauses of the Constitution are money mandating. This Court has held, for about the last 150 years, that to be the case; that they do not give the court jurisdiction at all.

This last issue, exhaustion of administrative remedies, I don't really have to rule on this one. I would just suggest that even though plaintiffs are entitled to a hearing it's — well,

it's not mandatory. The exhaustion of administrative relief is generally seen as a prerequisite to seeking judicial relief. Your position, Mr. Eidens, that it would be a waste of time is not necessarily so. You made a very persuasive argument this morning. I think that kind of an argument made before an Administrative Law Judge with some independence before the agency might well provide a different action by the agency. I've been surprised — let me put it this way: I've been surprised in the past when people have told me it would be a waste of time to go to the agency just to exhaust an administrative remedy when they know what the outcome is going to be. They're surprised and I'm surprised sometimes that the outcome is not what they thought it would be. So I don't rule on that one. However, in light of my ruling on the other four issues, I find that I lack subject matter jurisdiction over certain claims and other claims the complaint fails to state a claim for which relief can be granted. The Motion to Dismiss is allowed, and the complaint is dismissed with prejudice.